Supreme Court, U.S.
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No. 99-2036

In The

SUPREME COURT OF THE UNITED STATES

THE GOOD NEWS CLUB, ET AL.,
Petitioners,

v.

MILFORD CENTRAL SCHOOL,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY BRIEF

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1. Respondent offers no persuasive reasons why certiorari should not be granted to resolve a direct and explicit conflict among the Circuit Courts.

Respondent argues that certiorari should not be granted because (1) the Second Circuit decision is consistent with this Court's Establishment Clause cases, (2) the Second Circuit upheld the constitutionality of statute, and (3) there is no conflict among the Circuit Courts concerning the appropriate application of *Lamb's Chapel*. These arguments are misplaced and do not diminish the merits of petitioner's request for a writ of certiorari.

A. Respondent's Establishment Clause argument is unpersuasive.

Respondent's argument that the Second Circuit decision is consistent with this Court's Establishment Clause cases is a red herring. Without debating the merits of respondent's assertions, it suffices to point out to the Court that the Establishment Clause was not an issue in the Second Circuit's holding or opinion.

Moreover, if the Second Circuit had reached Milford's Establishment Clause argument and further if Second Circuit had decided the Establishment clause barred GNC's use of Milford's facilities, such a decision would have created a conflict with other Circuits. The federal courts have held that grade school age children can distinguish between government speech and private speech. *See Sherman v. Community Consolidated School District 21*, 8 F.3d 1160 (7th Cir. 1993) (explicitly finding that grade school children can understand that the school did not endorse the religious speech of the Boy Scouts even though the school

allowed the Boy Scouts to distribute flyers during school hours and to conduct their meetings after class); *Good News Club/Good Sports Club v. School Dist. of Ladue*, 28 F.3d 1501, 1509, fn. 18 (8th Cir. 1994) (noting that it does not require "Solomonic wisdom" for elementary students between ages 5 and 10 to make a distinction between private speech and government speech); *Hedges v. Wauconda Community School Dist. 118*, 9 F.3d 1295, 1298 (7th Cir. 1993) (rejecting the argument that "in order to avoid the appearance of sponsorship," a school may restrict religious speech in a junior high school).

Further, such a decision would have called into question this Court's decision holding that there is a critical difference between government speech endorsing religion, which the Establishment clause forbids, and private speech endorsing religion, which the Free Speech Clause protects. *Board of Education of Westside v. Mergens*, 496 U.S. 226, 248-53 (1990) (Bible club conducted by students on school property does not violate Establishment Clause); *Lamb's Chapel v. Center Moriches School Dist*, 508 U.S. 384, 395 (1993) (no violation of Establishment Clause for church to show religious film after school hours on school property); *Rosenburger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 839-40 (school funding of Christian newspaper does not violate Establishment Clause where funding is available to all student groups equally).

B. Respondent's reliance on Education Law §414 is unpersuasive.

Respondent asserts that New York law mandates that it exclude all speech with a religious purpose from its facilities and that the Second Circuit held the mandatory

exclusion constitutional. Respondent, therefore, reasons that since the statute passed constitutional muster in the Second Circuit, the case does not merit review by this Court[1].

It is precisely the way that the Second Circuit resolved this case that merits review by this Court. The Second Circuit's resolution of this case called into question the decisions of this Court, *See Good News Club v. Milford Central School*, 202 F.3d 502, 513 (2nd Cir. 2000) (Judge Jacobs in dissent noting that the majority's holding could not be squared with *Lamb's Chapel*); explicitly created a stark conflict among the Circuit Courts, *See* Petition for Writ of Certiorari p. 9-16 (outlining the precedent from other Circuit Courts that the Second Circuit explicitly declined to follow); and caused consternation among the states, see the brief for *Amici Curiae* of the States of Alabama, Iowa, Louisiana, Mississippi, Nebraska, Ohio, South Carolina, Texas, and Virginia in support of petition for a writ of certiorari at p.2 (arguing that the Second Circuit's decision places "*amici* States in the position of attempting to discern whether previously certain course set by the principle of viewpoint neutrality remains good law in all cases, or if it must be modified").

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[1] This Court, in *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993), had apparently resolved the issue of the application of § 414 with respect to the exclusion of speakers with a religious purpose. The Court held that a school district could not use Education Law §414 to bar a sectarian group's speech, even if the speech has a religious purpose. *Lamb's Chapel*, 508 U.S. at 393.

C. Respondent's assertion that there is no conflict among the Circuit Courts is unpersuasive.

Respondent seeks to distinguish the conflict between the Second Circuit and the other Circuits Courts on the issue of discrimination against a speaker's viewpoint on the basis that GNC's speech is directed to a child audience. This distinction is irrelevant, without merit, and was never addressed by the Second Circuit.

First, respondent's child audience theory is an irrelevant way to distinguish the conflict. The question of whether a government rule discriminates against a speaker's viewpoint is independent of the nature of the audience. That is, whether the audience is made up of adults or children or there is no audience at all, if the government discriminates against a speaker on the basis of his viewpoint, then it has violated the First Amendment absent a compelling state interest.

Second, respondent's theory is without a factual basis. Respondent maintains that 6-12 year old children, because of their age, are unable to distinguish between the private speech of GNC and the speech of teachers. There is no evidence to support this contention. Even the youngest child knows the difference between a meeting conducted after school which she voluntarily chooses to attend and speech conducted by a teacher in the classroom which she has no choice but to attend. Certainly, petitioner, Andrea Fournier, six (6) years old at the time of commencing her lawsuit, was not confused that GNC meetings were not part of the school curriculum. Milford in no way compels children to attend GNC meetings. Attendance to hear GNC's speech is voluntary and requires parental

permission. Thus the children who attend GNC meetings are not a captive audience.[2]

Third, the Second Circuit never sought to distinguish precedents from the other circuits on the basis that GNC's audience was children. Rather the Second Circuit explicitly declined to follow *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996) and *Good News/Good Sports Club v. School District of Ladue*, 28 F.3d 1501 (8th Cir. 1994).

CONCLUSION

The Second Circuit's resolution of this case calls into question the decisions of this Court, explicitly creates a stark conflict among the Circuit Courts, and causes consternation among the states. As noted in the Amici States' brief "this is an issue of national importance that requires resolution by this Court." Respondent offers no cogent reason why this Court should not issue a writ of certiorari to the Second Circuit.

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[2] The very premise of Milford's claim that the children can not distinguish between GNC meetings and classroom instruction is betrayed by Milford's own actions. The District Court granted an injunction to allow GNC to hold club meetings at Milford's facilities. If Milford believed that children were not able to distinguish between Good News Club meetings and classroom instruction, after the preliminary injunction was issued, Milford would have produced some sort of disclaimer to make clear to the children that GNC's speech was not the school's speech. No such disclaimer or explanation was offered to the children or their parents. Milford's actions reveal the hollowness of its argument.

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